

Correcting EPA's Misstatements on the CCR Rule's Alternative Closure Provision

Background: In its Phase 1 proposal to modify the CCR rule, EPA proposed adding a new section to the rule's "alternative closure" provision at 40 C.F.R. 257.103 allowing facilities to consider the lack of alternative disposal capacity for non-CCR wastestreams in qualifying for this limited exemption from forced closure. However, in explaining the scope of the *existing* alternative closure provision, EPA made serious misstatements that are at odds with the rule's regulatory text and inappropriately suggest a far narrower application of that provision than understood by the regulated community. EPA must fix this problem by acknowledging on EPA's CCR Frequently Asked Questions ("FAQ") website and in the preamble to the upcoming revisions to the rule that its prior statements regarding the scope of the existing alternative closure provision are incorrect and set the record straight with respect to the proper scope of this provision.

EPA's Misstatements: EPA incorrectly stated in the proposal that facilities qualifying for the alternative closure provision because they have no alternative disposal capacity for CCR "may continue to place CCR, **and only CCR**" in the impoundment. But this is wrong. While the rule provides that, within a specified time period of failing to meeting a standard triggering forced closure, the owner/operator must cease placing CCR and non-CCR waste streams in the unit and initiate closure, the rule also states that this prohibition—including the prohibition on placing non-CCR wastestreams in the unit—does not attach in the first instance if the owner/operator demonstrates that there is no alternative disposal capacity for CCR.

Need for Immediate Correction: Correction of this issue has taken on critical importance given the challenge by environmental petitioners in the Phase 1, Part 1 rule litigation to stay or summarily vacate the October 31 2020 deadline for unlined impoundments to initiate closure. EPA has warned that, if this were to happen, unlined impoundments would be required to immediately initiate closure, which would be impossible many units because there is no alternative disposal capacity for the hundreds of millions of gallons of CCR and non-CCR waste streams managed in CCR units as part of power production. Without a place to manage CCR and non-CCR wastestreams, companies will be compelled to close the plants altogether with the attendant risks to power reliability in regions across the country. This cannot be allowed to happen. Therefore, if the Court stays or summarily vacates the October 31, 2020 deadline and establishes an accelerated deadline for unlined impoundments to initiate closure, EPA should take immediate action to correct its previous error and articulate the proper scope of the existing alternative closure provision as including non-CCR wastestreams when co-managed with CCR.

The Solution: EPA must correct its error as soon as possible on the Agency's CCR Frequently Asked Question website, and then again in the preamble to an upcoming rulemaking—which could be EPA's rulemaking in response to the USWAG decision to re-evaluate the deadline for unlined impoundments to initiate closure. Suggested text for correcting this error is set forth below.

In describing the proposed amendment to § 257.103 in the Phase 1 CCR proposal, EPA made certain statements that facilities qualifying for the existing provision because they have no alternative disposal capacity for CCR “may continue to place CCR, and only CCR” in the designated unit.” 83 Fed. Reg. 11584, 11594 & 11595. In making these statements, EPA overlooked other regulatory text and thereby incorrectly characterized the operation of the existing alternative closure provision. Therefore, the statements in the March proposal suggesting that facilities qualifying for the existing alternative closure provision can only continue to place CCR and only CCR in designated units are incorrect.

When the CCR rule was promulgated in 2015, the alternative closure provision was designed to provide an exception to the rule’s forced closure requirements for a limited period of time if a facility could demonstrate that there was no alternative disposal capacity for CCR managed in the impoundment. As EPA recognized in promulgating this provision, the forced closure of units used to manage waste streams generated as a result of power production could result in the closure of the power plant and that “[s]hould a facility choose to comply with the regulation and stop generating power, there would be significant risks to human health that would arise if a community would be left without power for an extended period of time.” 74 Fed. Reg. at 21423. EPA concluded that the risks to the wider community from the disruption of power over the short-term outweighed the risks associated with the short-term continued use of these units, especially given that any risks would be mitigated by other requirements of the rule, including the requirements to continue with groundwater monitoring and corrective action. Id. The statements in the March preamble that facilities qualifying for the alternative closure provision can only manage CCR in these units would effectively undermine the very purpose of the provision to allow these units to continue operating as they were prior to triggering forced closure, which would necessarily include the continued use of the units to manage CCR and non-CCR wastestreams.

In addition to being consistent with EPA’s purpose in establishing the alternative closure provision, this correction also is consistent with the rule’s regulatory text. The rule provides that upon triggering forced closure, the owner/operator must, within a specified time frame, cease placing CCR and non-CCR waste streams in the unit and initiate closure of the unit (or retrofit in the case of an unlined impoundment). However, the rule provides that “[t]he timeframe specified in paragraph (a)(1)” for ceasing the placement of CCR and non-CCR waste streams in the unit and initiating closure or retrofit “does not apply if the owner or operator complies with the alternative closure procedures specified in § 257.103.” Id. at § 257.101(a)(3) (emphasis added). The same language is provided for units closing due to the failure to meet a location restriction. This means that if an owner/operator qualifies for the existing alternative closure provision in 40 C.F.R. § 257.103 by demonstrating no alternative disposal capacity for CCR, the timeframe for ceasing the receipt of CCR and non-CCR waste streams and commencing closure never begins to run; thus, the prohibition on the placement of CCR and non-CCR waste streams and the requirement to initiate closure or retrofit does not attach in the first instance.

This is the best interpretation of the 2015 rule. Any other interpretation would effectively undermine the very purpose of EPA promulgating the alternative closure provision in the first instance. An alternative interpretation would also be at odds with the plain language in § 257.101(a)(3) making clear that the timeframe for prohibiting the disposal of CCR and non-CCR waste streams in the unit does not attach if the facility demonstrates that there is no alternative capacity for CCR.¹

¹ This correction does not eliminate the need for a new alternative closure provision for units managing solely non-CCR wastestreams or EPA's request for comment on this addition. As reflected in comments on the proposal, there will be instances when a facility is able to find alternative disposal capacity for CCR (e.g., is able to convert to dry handling), but still must utilize the impoundments to manage non-CCR wastestreams that are necessarily generated during the production of power. There may be other instances where a facility has switched fuel sources from coal to gas, and therefore is no longer producing CCR, but is still managing non-CCR waste streams from gas-fired operations in the CCR unit. The current alternative closure provision does not address these situations. Therefore, EPA has proposed a new provision allowing for the consideration of non-CCR wastestreams when determining the availability of the alternative closure provision.